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NO. 73-1207

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

PHILIP T. BERKLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REBUTTAL TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

PHILIP T. BERKLEY IN PRO-PER
132 West Broadway
San Diego, California 92101

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The Petitioner has denied the unfounded charges of the Federal Trade Commission filed December 7, 1965 that his advertising was false, deceptive and misleading. This baseless charge pertained to his form letter advertising; newspaper advertising was not discussed during all the negotiations which

were consummated when Joseph W. Shea suggested in his letter of March 3, 1967 the use of a Disclaimer and approved by John Gordon Underwood in his letter of April 24, 1967. Since the Petitioner's form letters always aimed to make a sale and asked for money and was the only type advertising discussed throughout all the negotiations as mentioned, the thirteen compliance reports submitted by "Berkley" (the Petitioner) between June 1966 and April 1967 as mentioned in said "Memorandum in Opposition", Page 2, first paragraph, were all proposed advertisements in the form of letters - never in the form of newspaper advertisements. The "Disclaimer" therein mentioned was always used in said form letters which always endeavored to consummate a sale and asked for money.

The Petitioner was strongly assured by Mr.

James Ryan of the Federal Trade Commission that if he signed a Cease and Desist Order this would not be an admission of guilt; only on this basis did the Petitioner agree to sign this order, with the further understanding that the Commission would cooperate with him to change the wording so that it would be more acceptable to them.

The Petitioner felt that it was not necessary to use the Disclaimer when he ran newspaper advertisements that did not aim to make a sale through the newspaper advertisement itself, and therefore did not ask for money, but simply offered further information which always consisted of a form letter that contained the Disclaimer. Furthermore, whenever the Petitioner ran

newspaper advertisements which aimed to make a sale and therefore asked for money, the Disclaimer was used. Should he be penalized $2,000.00 for each time he ran these advertisements in which he offered only further information so that a sale was impossible until this further information was sent with the Disclaimer? This is a matter of plain logic and should have been so understood by the Commission. The Petitioner never represented (1) that his Trading Methods had been in existence for 15 years or (2) that stated profits were from actual trades based on his Methods, or that these profits were in any way predictable with any degree of certainty. They merely contained Tables which, when the Rules of the Methods are applied to past

market records, contained the theoretical results. This fact was understood and confirmed by 76 Affidavits presented as 76 Exhibits (cTR306 to 314; 319 to 352; 358 to 374; 378-390; 400-402). The Court will note in the copies of these newspaper advertisements in Exhibit 1 of the Petition For A Writ of Certiorari, that nothing is said to the effect that actual trades were made, but simply what the Table of Trades shows, - i.e., in the present tense.

In Exhibit 2 to the Petition, the Petitioner affirms that he omitted the first paragraph of the Commission's order since this was merely a prelude to the Cease and Desist Order.

The Petitioner affirms the last paragraph on Page 2 of the "Memorandum For The U. S.

In Opposition" but reiterates that these newspaper advertisements were not false, deceptive or misleading, and did not violate the Cease and Desist Order because only further information was offered, which information consisted of a form letter which always contained the Disclaimer. Seventy-six Affidavits as mentioned have been submitted to the District Court to prove these facts. Furthermore, the Petitioner was never advised, contrary to the false statements in Respondent's previous brief, that these newspaper advertisements would violate the Order before these newspaper advertisements were disseminated. This blatant lie that the Commission saw the proposed copies for newspaper advertisements and advised the Petitioner that

these advertisements would violate the Order, before they were disseminated - i.e., before the Petitioner ran these newspaper advertisements, is an act of deception and false assertions. Such lies naturally influenced the Ninth Circuit Court of Appeals in their decision to affirm the judgment of $8,000.00 against the Petitioner, regardless of whether or not the Court adopted the proposed findings of undisputed facts and conclusions of law pursuant to local rule 3(e) 4(a). In view of such outrageous circumstances though it involved written testimony, the Court of Appeals' summary affirmance without giving the Petitioner an opportunity to confront the Respondent, and personally deny these blatant lies and demand some kind of proof to justify their

irresponsible statements, was a violation of due process, - especially since two Petitions for a hearing on this matter were filed and denied.

Therefore, the Supreme Court should grant the Petition For A Writ of Certiorari so that it could review the details relating to the decision of Ninth Circuit Court of Appeals, - a decision that would set a precedent of injustice and cause considerable harm to the Petitioner, not only by the incurrence of a penalty of $8,000.00 which he can ill afford, as his business earnings during the past eight years have been well below $5,000.00 as shown in the Petition For A Writ of Certiorari on Page 11, and for 1973 there were no business earnings at all; furthermore, this injust precedent would

jeopardize the Petitioner since it could be used in suits against him where some of his Methods occasionally, though rarely, have recently shown losses; besides this, his newspaper advertisements in the past have been so unproductive that the Petitioner had decided to discontinue newspaper advertising in 1970, before suit by the United States was started against him, and has not advertised in newspapers since, and does not intend to do so in the future. The Petitioner was in a very severe accident on January 10, 1971, as a result of which he is handicapped, having damaged nerves in both his legs and back. While he realizes that this is irrelevant to his innocence or guilt in relation to

the question of the violation of the Cease and Desist Order, he feels that there is relevancy, with respect to the amount of penalty of $8,000.00, especially since his earnings no doubt have been affected by his severe disability and constant fatigue. According to the Electromyogram Report:

> "Widespread denervation in both lower extremities compatible with a multiple lumbo sacral radiculopothy or cauda equina lesion"

which indicates severe widespread damage to Petitioner's nerves in both legs and back.

In view of the aforementioned facts, the Petitioner prays that the Supreme Court grant the Petition For A Writ Of Certiorari so that the Eighth Amendment to the Constitution is sustained and excessive fines and hardship are not imposed; so that the Fourteenth Amendment to the Constitution

is sustained since due process of law was denied the Petitioner, when a hearing and a Petition for a hearing were both denied him by the Ninth Circuit Court of Appeals despite the fact that untrue and unprovable statements of a vital nature were made by the Respondent and denied by the Petitioner - denied with full justification and a sound basis for such denial.

Respectfully submitted,

Philip T. Berkley

PHILIP T. BERKLEY IN PRO-PER

APRIL 1974